No. ___

Supreme Court, U.S.
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IN THE 04-702

Supreme Court of the United States

SALIM AHMED HAMDAN
Petitioner,

v.

DONALD RUMSFELD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether Respondents are free to try Petitioner and others similarly situated at Guantanamo Bay Naval Station in military commissions under procedures that do not comply with the laws of war or the Geneva Conventions.

2. Whether Respondents may put Petitioner and others similarly situated at Guantanamo Bay Naval Station on trial before a military commission that lacks jurisdiction and is improperly constituted because it has not been affirmatively authorized by Act of Congress and violates the Uniform Code of Military Justice and other federal guarantees.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia is Salim Ahmed Hamdan, a citizen of Yemen who is currently detained at Guantanamo Bay.

The Respondents here and in the United States Court of Appeals for the District of Columbia are Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Mr. Salim Ahmed Hamdan petitions for a writ of certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the District of Columbia.

OPINION BELOW

The opinion of the district court (App. A., *infra*) is reported at 2004 WL 2504508.

JURISDICTION

The judgment of the district court was entered on November 8, 2004. The notice of appeal (App. D, *infra*) was filed on November 16, 2004. The case was docketed in the court of appeals on November 16, 2004, as No. 04-5393. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS INVOLVED

The relevant constitutional, statutory, and international law provisions involved are set forth in an appendix to the petition. App. B, *infra*.

STATEMENT OF THE CASE

A. The Underlying Facts

On November 13, 2001, the President of the United States issued a Military Order stating that internal and external attacks by international terrorists constituted a national emergency justifying the use of military commissions. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed.Reg. 57, 833 (Nov. 13, 2001). The rules that govern these military commissions stand in stark contrast to the fundamental protections mandated for an accused by Congress in the Uniform Code of Military Justice. *See, e.g.,* Military Order No.1, available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. These rules, for example, permit the exclusion of the accused from portions of his trial, *id.*, at § 6(B)(3); deny the accused the ability to represent himself, permit the admission of sworn or un-sworn statements

against the accused in lieu of testimony, *id.*, at § 6(D); and reserve for the Secretary of Defense or his designee the judicial power to rule in matters that terminate the proceedings, *id.*, at § 6(H)(1)-(6). The rules further provide that the limited protections available to defendants, such as the protection against being forced to testify and the presumption of innocence, are not "rights" that are "enforceable" in any way, *id.*, at § 10, and further provide that even these protections, such as they are, can be stripped at any time. *Id.*, at § 11.

In late November 2001, Petitioner Hamdan was captured while attempting to flee Afghanistan and return his family to his native country of Yemen. After being turned over to American forces, Petitioner was taken to the United States Naval Base at Guantanamo Bay, where he was placed with the general detainee population at Camp Delta.[1] On July 3, 2003, the President announced that there was "reason to believe" that Petitioner was eligible for trial by a military commission. In anticipation of that, Petitioner was placed in solitary confinement in Camp Echo, where he remained from December 2003 until late October 2004 (approximately four days before this case was argued in the District Court). During those eleven months, Mr. Hamdan was denied contact with the other detainees and permitted only very limited access to a translator. App. 60-61. Additionally, Mr. Hamdan was initially denied outdoor exercise during daylight hours and denied medical treatment despite his repeated requests. App. 60.

On December 18, 2003, the Chief Defense Counsel, pursuant to a request by the Prosecutor that defense counsel be appointed for the limited purpose of negotiating a pretrial agreement, detailed Lieutenant Commander Swift to serve as Mr. Hamdan's military counsel in the commission proceedings. Mr. Hamdan first met with Lieutenant Commander Swift on January 30, 2004. On February 12, 2004, Mr. Hamdan, through his counsel, filed a demand with the Appointing Authority for charges and a speedy trial under Article 10 of the Uniform Code of Military Justice

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[1] Affidavit of Salim Ahmed Hamdan, Feb. 9, 2004, attached as Exhibit B to the Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus, *infra* App. H., 58-61.

("UCMJ"). The Appointing Authority rejected Mr. Hamdan's speedy trial demand on February 23, 2004, concluding that Mr. Hamdan's detention did not fall under the ambit of the UCMJ. On July 9, 2004, more than two and a half years after Mr. Hamdan was first detained by the United States and eight months after the beginning of his solitary detention in Camp Echo, the Department of Defense formally charged Mr. Hamdan with the offense of conspiracy. Charge Sheet, App. 43.

B. The District Court Proceedings

On April 6, 2004, Lieutenant Commander Swift, standing as Mr. Hamdan's "next friend", filed a Petition for Mandamus or, in the Alternative, Habeas Corpus in the United States District Court for the Western District of Washington. App. 2. In an order dated August 9, 2004, the Honorable Robert S. Lasnik transferred the case from the Western District of Washington to the United States District Court for the District of Columbia pursuant to the Supreme Court's holding in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) and the Ninth Circuit's holding in *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004). The case was then docketed in the District Court for the District of Columbia on September 2, 2004.

On October 25, 2004, the District Court for the District of Columbia heard oral arguments on Petitioner's petition and Respondents' motion to dismiss. In its Memorandum Opinion dated November 8, 2004, the District Court granted the petition in part and denied Respondents' motion. App. 1. The District Court first rejected Respondents' contention that it was required to abstain from considering Petitioner's petition pending his trial before the military commission. App. 4-6. The District Court ruled that abstention was not required, and would not be appropriate, because Mr. Hamdan had "'raised substantial arguments denying the right of the military to try [him] at all.'" App. 5 (citing *Schlesinger v. Councilman*, 420 U.S. 738, 763 (1975)).

The District Court next ruled that military commissions may be used only to try offenses that are triable under the laws of war, including the Third Geneva Convention; that the convention is self-executing and judicially enforceable; and that, as long as his prisoner-of-war status is in doubt, the convention requires that Petitioner be tried by court-martial.

Id. 6-18. The District Court found that the procedures established by the President's Military Order do not satisfy the requirements of the Third Geneva Convention as embodied in the UCMJ, particularly in depriving Petitioner the right to attend portions of his hearing before the military commission and hear the evidence presented against him. *Id.* 18-29. For the President to go beyond the limits of the UCMJ in establishing military commissions, the District Court found, would place the President in the zone where his power is at "its lowest ebb" under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). App. 9.

C. Proceedings on Appeal

On November 16, 2004, the government filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit, App. 46-47. The Court of Appeals has jurisdiction pursuant to, *inter alia*, 28 U.S.C. §1292(a). The government's notice of appeal was timely filed within the 30 days allowed by Federal Rule of Appellate Procedure 4. The appeal was docketed in the court of appeals on November 16, 2004. The Government then filed a Motion for Expedited Appeal on November 16, 2004, which was granted by the United States Court of Appeals for the District of Columbia Circuit on November 17, 2004. App. 48-54. The Court of Appeals has set a briefing schedule under which the briefing will be complete on January 10, 2005. *Id.*

No oral argument date has been set. The case is nonetheless "in the court[] of appeals" within the meaning of 28 U.S.C. § 1254. *See* Robert L. Stern, et al., *Supreme Court Practice*, Sec. 2.4, at 75 (8th ed. 2002).

REASONS FOR GRANTING THE PETITION

Petitioner seeks certiorari before judgment because of the gravity of the questions presented and the need for their early definitive resolution by this Court. The United States has asserted that the decision below "derailed ongoing military commission proceedings" and "has substantial implications beyond this case."[2] App. 49. Although Petitioner

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[2] Mot. of the United States for Expedition of Appeal, *Hamdan v. Rumsfeld*, No. 04-5393, Nov. 16, 2004 ("U.S. Mot. to Expedite"), App. E,

believes the District Court did not "derail" the proceedings but instead concluded, correctly, that they had jumped the track, only this Court can provide the requisite finality demanded by matters of such importance. Petitioner, moreover, has been imprisoned for three years without process and is entitled to an expeditious resolution of his claims. The international dimension of this case also compels this Court's early resolution. Dozens of other countries have nationals being held at Guantanamo Bay who either are facing similar proceedings or may face them in the future.

Unless this Court grants certiorari before judgment, it is quite likely that final resolution of the Questions Presented would take more than a year from the present date without a Special Session of this Court. This one-year period is nearly inevitable from the schedule adopted by the Court of Appeals in agreeing to expedite briefing. App. 56-57. Such a delay would not only leave Petitioner detained at Guantanamo for an additional, fourth, year, it would leave the military commission process in limbo, cast a significant cloud over the Government's compliance with its international obligations, and promote continuing uncertainty in the courts in other cases. Such delay is particularly problematic since the decision by the district court below contains final decisions on matters that benefit each party in this litigation. In cases similar to this one, such as *Ex Parte Quirin*, 317 U.S. 1 (1942) (challenge to military commission) and *Reid v. Covert*, 351 U.S. 487 (1956) (challenge to court martial for a civilian), certiorari before judgment was granted. In this case, the need for certiorari before judgment is even greater, given the interests at stake, the centrality of Supreme Court precedent, and the likelihood that the Court's resolution will provide guidance to the courts of the District of Columbia in other cases.

This is not a case in which there exist plausible dispositions of the case by the intermediate appellate court that would moot the need for this Court's plenary review. If Petitioner were to prevail in the D.C. Circuit, it is clear that the United States would seek certiorari for many of the reasons it has set forth in its November 16 filing in that court

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infra. The United States has also called the decision "an unprecedented judicial intrusion into the prerogatives of the President" with "potentially very broad and dangerous ramifications." App. 50.

urging expedition of the appeal. If the government were instead to prevail in the D.C. Circuit, the Petitioner would seek certiorari for the same reasons as those set forth in this petition. The issues are purely legal in character and no finding by the Circuit Court, and no disposition of those issues, would diminish their import.

Furthermore, after *Padilla v. Rumsfeld*, 124 S. Ct. 2711, 2725 n.16 (2004), the benefits of so-called "percolation" in the rulings of the several circuits are absent inasmuch as only one circuit can hear these cases. And, of course, Petitioner is being confined for purposes of a proceeding that a ruling in his favor on the Questions Presented would preclude. Each month that passes while the D.C. Circuit ponders precisely the same legal questions that would come to this Court on certiorari is a month that can never be returned if, as Petitioner believes, he has committed no offense and has indeed done nothing that warrants the continued deprivation of his liberty. And it is another month in which uncertainty in the lower courts and at Guantanamo Bay will persist.

A. A Writ of Certiorari Before Judgment Is Appropriate in the Extraordinary Circumstances of this Case

1. A petition for a writ of certiorari before judgment will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. *See* Petition of the United States for Certiorari Before Judgment, *United States v. Fanfan*, No. 04-105, at 9 (discussing Rule's meaning), *cert. granted*, 125 S. Ct. 12 (Aug. 2, 2004).

2. This case meets the stringent standard of the Court's Rule 11, as it involves: (a) intricate questions about the power of the Executive during military conflict, *e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952) (certiorari before judgment granted); *Ex Parte Quirin*, 317 U.S. 1 (1942) (certiorari before judgment granted); (b) important questions about the relationship of the Executive Branch to the other two coordinate Federal Branches, *e.g.*, *United States v. Nixon*, 417 U.S. 927 (1974) (certiorari before judgment granted); (c) the relationship of the United States with other nations, *e.g.*, *Dames & Moore v. Regan*, 453 U.S.

654, 667-68 (1981) (certiorari before judgment granted); *Wilson v. Girard*, 354 U.S. 524, 526 (1957) (certiorari before judgment granted); *The Three Friends*, 166 U.S. 1, 5 (1897) (certiorari before judgment granted); and (d) the administration of military justice, *e.g., Reid v. Covert*, 351 U.S. 487, 488 (1956) (certiorari before judgment granted); *Kinsella v. Kruger*, 351 U.S. 470, 473 (1956) (certiorari before judgment granted).

In the past, the Court has typically found any one of these four factors sufficient to warrant granting certiorari before judgment. All four factors are present here. Indeed, this case raises the same sorts of questions as those presented in *Ex Parte Milligan*, 71 U.S. 2 (1866), *Quirin*, *Youngstown*, and *Reid*. The latter three are all cases in which certiorari before judgment was granted, the first one preceded the enactment of the Expediting Act, 28 U.S.C. § 1254(1).[3] And none of the reasons ordinarily supporting a denial of certiorari before judgment is present.

3. This case, like *Ex Parte Quirin*, requires the Court to determine the proper balance between individual rights and Executive power during armed conflict. In *Quirin*, which involved a similar challenge to a military commission, the Court granted certiorari before judgment on the request of the military-commission defendants:

> In view of the public importance of the questions raised by [the saboteurs'] petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications

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[3] Even before the Act, however, the Court moved quickly to hear *Ex Parte Milligan* after District Judge David McDonald and Circuit Justice Davis disagreed on the legal question. "By advancing the *Milligan* case on its calendar, the Supreme Court indicated that the issues presented were of extraordinary importance." William H. Rehnquist, All the Laws But One 118 (1998).

> be set down for full oral argument at a special term of this Court.

317 U.S. at 19.

The challenge to the military commission in *Quirin*, like the challenge here, raised far reaching questions of national security and separation of powers in war time and controlled the fate of individuals who, like Petitioner, claimed that the procedures to which they had been subjected were unlawful. The need here for certiorari before judgment is even stronger in this case than in *Quirin*. In *Quirin*, the district court denied habeas, and the Court could have stayed its hand, awaiting decision by the Court of Appeals, without concern for the effect of the district court's decision on the Executive Branch. Here, the District Court has granted habeas. App. 31. Even if the Court of Appeals were to reverse the District Court, the questions presented by the petition are too momentous for this Court *not* to decide: "Had this tribunal the legal power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people." *Milligan*, 71 U.S. at 118-19. *See also Amicus Curiae Brief of 16 Professors of Constitutional Law, Hamdan v. Rumsfeld* (D.D.C. 2004), available at http://www.law.georgetown.edu/faculty/nkk/documents/constllawprofessors.pdf.

4. The Court has also granted certiorari before judgment in cases which implicate the scope and administration of military justice. In *Reid*, 351 U.S. at 488, and *Kinsella*, 351 U.S. at 473, two civilians had been tried by court-martial abroad, and challenged the constitutionality of those courts' jurisdiction over them. The Court granted the writ before judgment in the court of appeals "because of the serious constitutional question presented and its far-reaching importance to our Armed Forces stationed in some sixty-three different countries throughout the world." *Kinsella*, 351 U.S. at 473. Like *Reid* and *Kinsella*, this case calls upon the Court to examine swiftly whether the military is improperly meting out justice to those who deserve greater procedural protections, and like *Reid* and *Kinsella*, this Court's answer will have far-reaching effects on the Armed Forces' conduct. In those two cases, the Court ultimately found that the court-martial process unconstitutionally deprived civilians of their rights. *Reid v. Covert*, 354 U.S. 1 (1957).

5. Writs of certiorari before judgment are particularly appropriate in cases which – like this case of a Yemeni national, and like the many cases bound to follow involving the citizens of any number of other nations captured in the global war on terror and set to be tried before one of the President's military commissions – implicate presidential power in the context of foreign relations. The very first grant of certiorari before judgment occurred during the Cuban Revolution that preceded the Spanish-American war. *The Three Friends*, 166 U.S. at 40. In that case, the government had seized a ship, claiming that it violated a federal law that prohibited outfitting a ship for a "foreign colony, district, or people." *Id.* at 58. The ship owners successfully argued to the district court that Cuban revolutionaries were not a "foreign colony, district, or people" despite the Government's broad claim that they were. *Id.* The Supreme Court granted certiorari before judgment in view of the public importance of the matter. *Id.* at 49; James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 S. Ct. Rev. 259, 268-69 (1986). As the Court put it later that Term in phrases that echo today:

> [Certiorari before judgment was granted in *The Three Friends* because] the question involved was one affecting the relations of this country to foreign nations, and therefore one whose prompt decision by this court was of importance, not merely for the guidance of the Executive Department of Government but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this.

Forsyth v. City of Hammond, 166 U.S. 506, 514 (1897). *See also McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963) ("the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy"); Lindgren & Marshall, *supra*, at 292-93 ("A foreign nation may deserve a definitive ruling from our nation's highest legal

authority....Also, the appellate process may lead to conflicting results at each stage of review. Effective foreign policy, on the other hand, requires consistent signals.").

The Court granted certiorari before judgment in *Dames & Moore*, 453 U.S. at 667-68, which presented an immediate need for resolving the disposition of Iranian assets seized pursuant to an Executive Agreement. *See also Wilson*, 354 U.S. at 526 (granting certiorari before judgment to evaluate whether it was proper for the Secretaries of State and Defense to deliver an American serviceman for trial in Japanese courts pursuant to an Administrative Agreement between the two nations). As the opinion below has unequivocally ruled, the military commission that Mr. Hamdan would now confront but for its Judgment granting habeas relief violates Geneva Convention obligations, imperiling relationships with other nations and threatening the ability of our Government to demand compliance with the Geneva Conventions when American soldiers are captured. App. 15. *See Amicus Curiae Brief of 271 British and European Members of Parliament, Hamdan v. Rumsfeld* (D.D.C. 2004), available at http://www.law.georgetown.edu/faculty/nkk/documents/271europeanmembersofparliament.pdf, at 10 ("When it disregards international law, the United States risks setting precedents that will adversely affect its own citizens abroad."); *Amicus Curiae Brief of International Law Professors, Hamdan v. Rumsfeld* (D.D.C. 2004), available at http://www/law.georgetown.edu/faculty/nkk/documents/intllawbrief.pdf.

Furthermore, this case raises questions that profoundly affect the administration of justice. In *Mistretta v. United States*, 488 U.S. 361, 371 (1988), and, just recently, in *United States v. Fanfan*, 125 S. Ct. 12 (2004), this Court granted certiorari before judgment to pass upon the constitutionality of the sentencing guidelines – an issue of "imperative public importance." *Mistretta*, 488 U.S. at 371.[4]

6. The fact that Mr. Hamdan prevailed in the district court below does not counsel against granting this petition.

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[4] Certiorari before judgment has also been used in times when the Court needs to protect the institutional authority of the judiciary. *See* Lindgren & Marshall, *supra*, at 287-88, 294-95. *Cf.* Dan Eggen, *Ashcroft Decries Court Rulings: 'Second-Guessing' Bush on Security Raises Risk, He Says*, Wash. Post, Nov. 13, 2004, at A6.

Certiorari before judgment has been granted to the prevailing party in the district court a number of times. For example, in *Nixon,* 418 U.S. at 686-87, 690, the Court granted certiorari before judgment, on the petition of the prevailing party in the district court, in a case involving the reach of the Executive power because of the "public importance of the issues presented and the need for their prompt resolution..." *See also United States* v. *United Mine Workers,* 330 U.S. 258, 269 (1947); *United States* v. *Bankers Trust Co.,* 294 U.S. 240, 294-295 (1935); Brief of the United States for Certiorari Before Judgment, *New York v. Microsoft*, No. 00-261 4 n.3 ("The Court's power to grant certiorari before judgment extends to petitions filed by the party that prevailed in the district court.") (providing citations); Stern & Grossman, *supra*, at 78 ("The Court has given literal effect to the words 'any party' [in the Expediting Act, 28 U.S.C. § 1254] in holding that if the losing party in a federal district court appeals to a court of appeals, and the record is docketed therein, the successful party can, prior to judgment in the court of appeals, petition the Supreme Court to hear the case in lieu of the court of appeals").

The Court also granted certiorari before judgment when called to do so by the prevailing party in *Youngstown*, 343 U.S. at 579, a case where the President seized the nation's steel mills, claiming that the country's war-making needs demanded it. After the district court found that the President had overstepped his bounds and enjoined the seizure, both parties filed petitions for certiorari in this Court, asserting that the "interests of the Nation [require that] the vital questions here presented should be resolved at the earliest possible moment by this Court." Pet. for Writ of Certiorari Before Judgment, on Behalf of Petitioner, 6 (adding that although the District Court had "necessarily and correctly decided the fundamental constitutional questions involved," the Nation required that the Court "authoritatively confirm" that decision). The Court accepted certiorari and promptly struck down the President's use of power. *Youngstown*, 343 U.S. at 588-89.

B. Review of the District Court's Decision Regarding the Legality of Military Commissions Is Warranted Because of the Importance of Military Commissions and Because the Ruling Below Has Tremendous Significance for Other Cases

1. In its motion to expedite this case in the Court of Appeals, the United States has outlined a set of claims that would support certiorari before judgment. U.S. Mot. To Expedite, App. 48-54.

- The Government argues for expedition because it says the district court's opinion "derailed the ongoing military commission proceedings" and reached "legally erroneous rulings with potentially very broad and dangerous ramifications." The Government states that these rulings "represent an unprecedented judicial intrusion into the prerogatives of the President and warrant expedited review by this Court." App. 49-50.
- The Government contends that the district court's ruling on the Geneva Convention "has substantial implications beyond this case." In particular, it states that the ruling below "opens a veritable Pandora's box where the Executive attempting to protect this nation through the use of military force would become entangled in a morass of litigation," and would "indisputably encumber the President's authority as Commander in Chief." App. 50. It further asserts that the decision below conflicts with *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). App. 50.
- The Government claims that the district court "effectively overrules the President's determinations" about al Qaeda and that "[t]hese determinations

were fundamental exercises of the President's authority as Commander in Chief" and the court's order "is in itself a substantial injury to the President's authority." App. 51.

- The Government concludes by stressing the need for expedited resolution to re-start the military commission process and "to minimize the unwarranted delay caused by the district court's order in the conduct of these important military commission proceedings." App. 52.

2. Petitioner has waited three years to have a fair trial. Throughout this time, he has languished in detention, deprived of his liberty and access to his wife and children. App. 60-61. Prompt resolution of the legal issues by this Court will provide authoritative guidance that no other court is able to offer – to the Executive Branch, to Congress, to the bench and bar, and the world community as to the rights, powers, and obligations of the several arms of the United States Government in this momentous period. If military commissions are worth conducting, they are worth conducting lawfully and being *perceived* as so conducted. Their deployment in jurisdictionally dubious contexts or in legally clouded conditions can only work a disservice to their potential utility when confined to proper circumstances and conducted under legally appropriate ground rules. Only this Court's prompt and decisive resolution of the questions presented by the use of military commissions in the circumstances of this case can dispel those clouds swiftly and with the certitude that those conditions require.

3. Unlike typical cases, in which an issue may "percolate" through various Courts of Appeal and be tested by numerous Circuits, the issues here can *only* be heard in the Court of Appeals for the District of Columbia. *See Padilla*, 124 S. Ct. at 2725 n.16. The benefits of percolation are therefore reduced here as compared to the typical case. In addition, the vast outpouring of scholarly and *amici* interest in the case over the past three years has created a vibrant and mature debate that may inform this Court's resolution of the

Questions Presented.[5] The case has been fully briefed in the District Court – and the issues will inevitably reach this

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[5]In the district court in this case, for example, briefs were filed on behalf of (1) Arthur Miller; (2) 271 United Kingdom and European Parliamentarians; (3) International Law Professors; (4) 16 Professors of Constitutional Law; (5) General David M. Brahms, Admiral Lee F. Gunn, Admiral John D. Hutson and General Richard O'Meara; (6) Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, Marco Sassoli and The Center for International Human Rights of Northwestern University School of Law; and (7) the Washington Legal Foundation.

Academic literature debating the legality and constitutionality of military commissions is plentiful. *See, e.g.*, Jordan J. Paust, *Post-9/11 Overreaction And Fallacies Regarding War And Defense, Guantanamo, The Status Of Persons, Treatment, Judicial Review Of Detention, And Due Process In Military Commissions*, 79 NOTRE DAME L. REV. 1335 (2004); Melissa J. Epstein and Richard Baker, *The Customary Origins And Elements Of Select Conduct Of Hostilities Charges Before The International Criminal Tribunal For The Former Yugoslavia: A Potential Model For Use By Military Commissions*, 179 MIL. L. REV. 68 (2004); Kevin J. Barry, *Military Commissions: Trying American Justice*, Army Lawyer, Nov. 2003, at 1; Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371 (2003); David Stoelting, *Military Commissions and Terrorism*, 31 DENV. J. INT'L L. & POL'Y 427 (2003); Eugene R. Fidell, *Military Commissions and Administrative Law*, 6 GREEN BAG 2d 379 (2003); Robert John Araujo, *A Judicial Response to Terrorism: The Status of Military Commissions under Domestic and International Law*, 11 TUL. J. INT'L & COMP. L. 117 (2003); John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response To Professors Katyal And Tribe*, 34 TEX. TECH L. REV. 899 (2003); Laura A. Dickinson, *Using Legal Process To Fight Terrorism: Detentions, Military Commissions, International Tribunals, And The Rule Of Law*, 75 S. CAL. L. REV. 1407 (2002); Juan R. Torruella, *On The Slippery Slopes Of Afghanistan: Military Commissions And The Exercise Of Presidential Power*, 4 U. PA. J. CONST. L. 648 (2002); Kenneth Anderson, *What To Do With Bin Laden And Al Qaeda Terrorists?: A Qualified Defense Of Military Commissions And United States Policy On Detainees At Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591 (2002); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity Of Military Commissions*, 5 GREEN BAG 2d 249 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); Michael O. Lacey, *Military Commissions: A Historical Survey*, Army Lawyer March, 2002, at 41; David Golove, *Military Tribunals, International Law, And The Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363 (2003); George Rutherglen, *Structural Uncertainty Over*

Court; any decision by the Circuit Court thus would "have no effect on the basic posture of the constitutional questions presented . . . ." Pet. for Writ of Certiorari in *Youngstown Sheet & Tube*, at 7-8; *Youngstown*, 343 U.S. 937 (1952) (granting certiorari before judgment).[6]

C. This Case Squarely Presents the Issues On Which this Court's Guidance is Needed

This is the first case to challenge the constitutionality of a military commission since the aftermath of World War II. Since the Court's landmark decisions in *Ex Parte Quirin* and *Johnson v. Eisentrager*, 337 U.S. 763 (1950), remarkable changes have altered the legal landscape. The United States has ratified the Geneva Conventions. The Government has extended its law extraterritorially. And the Uniform Code of Military Justice has been enacted and has completely revolutionized the predecessor Articles of War. These significant developments necessitate the involvement of this Court in answering the questions presented, which ask whether the present day military commissions are consistent with the current law and treaties of the nation.

The facts of this case raise each of the questions presented. Petitioner did not receive an Article 5 hearing under the Geneva Convention or under Sec. 190-8 of the Army Regulations; he is being prosecuted in the name of the laws of war and the President has invoked, as the basis of his authority, 10 U.S.C. §§ 821 and 836. Petitioner receives different protections and rights than all others who face courts-martial under the UCMJ.

Habeas Corpus & The Jurisdiction Of Military Tribunals, 5 GREEN BAG 2d 397 (2002); Daniel A. Rezneck and Jonathan F. Potter, *Military Tribunals, The Constitution, and the UCMJ*, 2002 FED. CTS. L. REV. 3; Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying The Military Tribunals*, 111 YALE L.J. 1259 (2002).

[6] In *Youngstown*, the Court ignored the protests of two justices who preferred to wait for Circuit Court resolution, 343 U.S. at 937 (Burton & Frankfurter, J.J., dissenting from grant of certiorari), instead "[d]eeming it best that the issues raised be promptly decided by this Court." *Youngstown*, 343 U.S. at 584.

D. The Military Commission Being Used to Try Petitioner Is Unlawful and Implicates Separation of Powers Concerns That Require This Court's Immediate Consideration

This case challenges an unprecedented and dangerous expansion of Executive Branch authority cloaked in the exercise of the President's war powers. Far from the battlefield – however broadly defined – and remote from any zone of military occupation, the President has unilaterally created a military commission, justified not as ancillary to his invasion of Iraq to topple the regime of Sadam Hussein, not as ancillary to the post-invasion occupation of Iraq or the current military hostilities there, but rather by the far broader and more amorphous rubric of the "war" on international terrorism. That "war" manifestly is not a war in any sense of that term against any nation state or indeed against any well-defined enemy, nor is it a war with any defined or definable geographic arena of conflict, nor a war in which one can pinpoint a date when hostilities began, or a means of determining when hostilities are at an end, and it most assuredly is not a war that was ever declared by Congress. In an undeclared war, unbounded by time, place or the identity of the enemy, Respondents have relied on legal precedents set during previous conventional wars in order to designate Petitioner Hamdan an enemy combatant and to prefer war crimes charges.

The applications of concepts of conventional war to a war on terrorism obviously raise profound legal issues with which this Court will in due course need to grapple. Most of these issues, thankfully, are not presented here. This case challenges only the creation and use of a military commission created without Congressional authorization, in a place far removed from any military hostilities, to try an offense unknown to the laws of war and not authorized to be tried by commission, under procedures that flout basic tenets of military justice against a civilian who contests that he is an unlawful belligerent.

Respondents have argued that although the UCMJ is authority for creating the military commission, its protections and procedures are not applicable in this case. The plain language of the UCMJ and its legislative history establish

that it does apply. Indeed, the very UCMJ provision upon which Respondents rely for authority to create the military commission itself unmistakably states that the procedures, rules, and principles of law followed by a military commission "may not be contrary to or inconsistent with" the UCMJ. 10 U.S.C. § 836. Furthermore, the UCMJ broke from the predecessor Articles of War by extending the protections of the Code to all leased territories, like Guantanamo Bay, that are under the control of the Secretary of the Defense. *Compare Yamashita v. Styer*, 327 U.S. 1, 20 (1946) (stating that Congress "did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons" and that General Yamashita was "not a person made subject to the Articles of War by Article 2") *with* 10 U.S.C. § 802(12) (expanding the list of persons "subject to this chapter" to include "persons within an area leased by" the United States and subject to the control of the Secretary of Defense).

Because the UCMJ applies, the confrontation rights of courts-martial must extend to military commissions. *See* 10 U.S.C. § 839 (providing rights of confrontation). This tracks the "general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial." W. Winthrop, Military Law and Precedents, 835 n.81 (2d ed. 1920) (citations omitted); Act of July 2, 1864, 13 Stat. 356 (extending court-martial provisions to commissions). *See also Crawford v. Washington*, 124 S. Ct. 1354, 1363 (2004) (finding confrontation rule one of common law "founded on natural justice" (quoting *State v. Webb*, 2 N.C. 104 (1794)).

Respondents chiefly rely on *Quirin* and *Yamashita* to support the legitimacy of the military commission at issue in this case. However, as the district court noted, those cases identify the source of authority to create military commissions as Article I, § 8, cl. 10 of the Constitution, which confers on Congress the power "to define and punish...Offenses against the Law of Nations." *See, e.g.*, *Yamashita*, 327 U.S. at 7; App. 6. Indeed, in *Quirin*, the Court expressly found it unnecessary "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress

has authorized trial of offenses against the law of war before such commissions." *Quirin*, 317 U.S. at 11. Article 15 of the Articles of War, which in *Quirin* and *Yamashita* was identified as the source of such Congressional authorization, is now set forth in the Uniform Code of Military Justice at 10 U.S.C. § 821.

Respondents invoke 10 U.S.C. § 821 as authorization for the military commission, but fail to acknowledge the limits on the jurisdiction of military commissions established by that statute. The statute authorizes trial by military commission only for "offenders and offenses that by statute or by the law of war may be tried by military commissions." *Id.* Respondents can point to no statute that identifies Petitioner as an "offender" or conspiracy as an "offense" triable by military commission. Accordingly, by invoking 10 U.S.C. § 821, Respondents necessarily rely on the *laws of war* as the source of authority for identifying one who may be tried by military commission.

The District Court, however, properly recognized that the law of war now includes the Third Geneva Convention ("GPW"). *See Hamdi v. Rumsfeld*, 124 S.Ct. 2633, at 2641 (2004) (plurality opinion) (citing numerous Articles of the GPW); App. 9-10. Under Article 5 of the GPW, if any doubt exists concerning whether an individual is entitled to the protections of the GPW, that person must be afforded all the protections of the Convention "until such time as their status has been determined by a competent tribunal." GPW, Art. 5; *see also* Army Regulation 190-8, § 1-6(a), "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees" (implementing the GPW, as recognized by Justice Souter in his separate opinion in *Hamdi*, 124 S. Ct. at 2658). There can be no reasonable dispute that Petitioner in this case has not been afforded an Article 5 hearing. Accordingly, he is entitled to the protections of the GPW, including those set forth in Article 102.

Article 102 of the GPW provides that a protected person "can be validly sentenced only if the sentence is pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." The District Court properly held that the military commission in this case "is not such a court. Its procedures are not such procedures." App. 10.

The strained arguments advanced by Respondents to avoid this result are unavailing. First, Respondents assert that the GPW does not apply to Petitioner because he is a member of al Qaeda, the war against al Qaeda in Afghanistan was "separate" from the armed conflict against the Taliban (who controlled the state), and the GPW does not extend to armed conflicts against non-state entities. The District Court correctly rejected these arguments. App. 11. Not only is the factual premise in doubt, Respondents' interpretation is also refuted by the language and structure of the Convention itself. That language by its terms applies in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." GPW, Art. 2. Afghanistan and the United States are both High Contracting Parties to the GPW. App. 10. Respondents' interpretation also ignores the historical fact that the United States has consistently applied the GPW to both regular and irregular enemy forces in the numerous conflicts in which this country has been involved since ratifying the GPW in the mid-1950s.

Respondents go so far as to assert that the "separate" nature of the conflict against al Qaeda is a Presidential "finding" that is unreviewable by Article III courts. App. 51. Of course, this so-called "finding" – asserted in an effort to disqualify the judiciary from its constitutional obligation to interpret and give effect to a treaty of the United States – is a mere appellation that seeks to turn disputed facts into a political question. Moreover, Respondents are simply wrong in claiming that the Executive's interpretation of a treaty is conclusive and unreviewable. Under the Supremacy Clause, treaties are the supreme law of the land, and it is axiomatic that it is the province of the judiciary to interpret the law. In *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933), this Court stated that "the construction of a treaty by the political department of the government [is] not conclusive upon courts called upon to construe it" (internal citations omitted). In addition, the District Court's interpretation of the applicability of the GPW is fully consistent with the long-standing canon of construction that "a treaty should generally be construed...liberally to give effect to the purpose which animates it and...where a provision of a treaty fairly admits of two constructions, one restricting, and the other enlarging, rights which may be claimed under it, the more liberal

interpretation is to be preferred." *United States v. Stuart*, 489 U.S. 353, 368 (1989) (internal quotation marks and citation omitted).

Respondents also argue that Petitioner's rights under the GPW, if any, are not enforceable in an Article III court, raising the specter of "private rights of action" that they claim are implicitly asserted in this case. However, as the District Court noted, this case has nothing to do with "private rights of action" under the GPW. Rather, the GPW is simply the most complete current statement of the laws of wars with respect to POWs and others seized in the course of armed conflict. It is implicated in this case by operation of the very statute that Respondents invoke as the source of Congressional authority for their conduct, 10 U.S.C. 821. The Executive cannot lawfully ignore the instruction of Congress that any military commission operate in conformity with the laws of war. The District Court was therefore correct in dismissing Respondent's argument as nothing more than "[an] assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation." App. 15. The Court should reaffirm that, even in times of national emergency, the interpretation of the law is a judicial function, and no derogation from its prerogatives in the independent exercise of that function can be countenanced if the rule of law is to endure in this Republic.

Yet Respondents, even after the reminder that "a state of war is not a blank check for the President," *Hamdi*, 124 S. Ct. at 2650 (plurality op.), continue to press in the Court of Appeals the breathtaking claim of Presidential power unconstrained by law. *See* U.S. Mot. To Expedite, App. 52. ("The appeal also presents the critical issue of whether the President has inherent authority to create military commissions to try enemy combatants."). If any judicial body is to become the first to accept so sweeping a concept of unbounded and untethered power supposedly inhering in the Office of President, that body can only be (although Petitioner trusts it will not be) this Court. Therefore, it must be said that the government's submission is directed to the wrong building. And whatever inherent power may exist by virtue of the "war" on global terrorism surely cannot include the power to detach an exceptional and specialized institution from its historical underpinnings, and deploy it in completely

different circumstances, whether for reasons of political expediency or even for reasons of military convenience.

Such efforts in the past have been decisively rejected, as, for example, in this Court's landmark opinion in *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866). In that Civil War case, the Court struck down as unconstitutional the conviction of a civilian before a military commission. "Martial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction," said the Court, for "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." *Id.* at 120-21, 127. Today, the President's unilateral creation of the military commission, his solitary definition of the offenses and persons subject to its jurisdiction, and his single-handed promulgation of the rules for adjudication of cases before it combine to violate the separation of powers built into the plan of our Constitution.

Respondents have also argued that, in promulgating the Authorization for the Use of Military Force (AUMF) shortly after the September 11 attacks, Congress also implicitly authorized the President to create commissions for the trial of alleged war criminals. The AUMF is conspicuously silent on the subject. While the authority to use military force implies the power to detain those captured in battle, it does not reasonably imply a power to set up a judicial tribunal far removed from zones of combat or military occupation. As the Court noted in another context, "[s]uch a latitudinarian interpretation...would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority." *Reid*, 354 U.S. at 30 (plurality opinion).

In making their argument, Respondents have relied extensively on *Hamdi*, 124 S. Ct. 2633 (plurality opinion). But the Court expressly declined to rule on the scope of the President's authority in that case: "The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not

reach the question whether Article II provides such authority, however, because we agree...that Congress has in fact authorized Hamdi's detention, through the AUMF." *Id.* at 2639. Significantly, the plurality went on to emphasize that the AUMF only purported to authorize continuing detention of individuals who were confirmed enemy combatants, whose status it held had to be determined "in a proceeding that comports with due process." *Id.* at 2643. Indeed, the *Hamdi* plurality repeatedly looked to the GPW to outline the powers of the Government. *See id.* at 2641 (citing Art. 118 and article mentioning Arts. 85, 99, 119, 129); *id.* (stating that "our understanding is based on longstanding law-of-war principles").

This case raises the question of the reach of *Hamdi*, which on its own terms dealt only with the question of detention, and not adjudication of war crimes. Respondents have overread the plurality's descriptive statement: "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' *Ex parte Quirin,* 317 U.S. at 28." *Hamdi*, 1245 S. Ct. at 2640. This description of past history is not in dispute. Indeed, that description does not even answer the question of *what body* must try unlawful combatants. *See also id.* (referring to "mere detention"); *id.* at 2643 (stating that *Quirin* is "the most apposite precedent that we have on the question of whether citizens may be *detained* in such circumstances") (emphasis added).[7] While the law on detention has changed somewhat since World War II, the law with respect to military trial has changed dramatically, with the enactment of

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[7] It is also significant that Justice Thomas' opinion in *Hamdi*, which Respondents relied upon in the district court to suggest a fifth vote for the lawfulness of military commissions, was carefully confined to detention, mentioning the term (or derivations of the term such as "detain") at least forty-six times in his opinion. *See Hamdi*, 124 S. Ct. at 2674, 2677-85. Justice Thomas acknowledged that *punishment* stands on entirely different footing than detention, specifically isolating the *Milligan* case: "More importantly, the Court referred frequently and pervasively to the criminal nature of the proceedings instituted against Milligan...the punishment-nonpunishment distinction harmonizes all of the precedent." *Id.* at 2682 (citations omitted).

the UCMJ, the ratification of the Geneva Conventions, and the constitutional and statutory changes to courts-martial.

E. Expedited Consideration by the Court of Appeals Is Not Enough

Petitioner's case requires a prompt resolution that intermediate appellate review cannot provide – particularly because that resolution will necessarily be purely tentative until this Court will have spoken on the matter. And, even in the difficult to imagine circumstance that the D.C. Circuit has the last word for the time being on the profound questions necessarily presented by this case, only this Court is capable of pronouncing with final authority on these questions – questions whose resolution may well affect a wide range of other activities the President has ordered in conjunction with the war on terror – the other trials by military commission, the Combatant Status Review Tribunals, and the treatment of the other Guantanamo Bay prisoners. *See* U.S. Mot. To Expedite, App. 56-57. Even the expedited briefing schedule in the D.C. Circuit will leave Petitioner languishing, and the Government without judicially sanctioned direction, for a far longer period than is necessary to resolve this case or is justified by its circumstances. When the whole world is watching and waiting, only a resolution by the Supreme Court of the United States can allow justice to exhale.

Petitioner does not dispute the need for speed but submits that the best way to accommodate that need is for review by this Court at this time. The number and complexity of the issues suggest that one longer briefing schedule in this Court will produce papers better calibrated to the gravity of the issues presented. As the leading article on the subject describes it:

> Expedited appeal, however, raises problems of its own. A rushed schedule in two appellate courts may not produce a more considered opinion than a somewhat longer deliberation in one court.

Lindgren & Marshall, *supra*, at 282. This concern is at its height here, for the briefing schedule set by the Court of Appeals does not permit oral argument until the middle of January, 2005, at the earliest. Even were that court to issue an

opinion quickly, it would be quite difficult for this Court to schedule the case during the 2004 Term at that date. For that reason, the possibility exists that a legal cloud could hang over the military commission for more than a year from the filing date of this motion. Certiorari before judgment would avoid that circumstance, and provide guidance to both the government and those who are currently locked up at Guantanamo to face military commissions.

The need for resolution by this Court is even more pressing because all of the relevant precedents are ones of this Court, and not those of the D.C. Circuit. This case is governed by the meaning of *Milligan, Quirin, Youngstown*, and *Reid*, and, to some extent, *Hamdi* and *Rasul*. One need not go as far as Justice Frankfurter did in another case to underscore the special value of certiorari before judgment here:

> These are not questions on which, with all due respect, a lower court can be of effective assistance to this Court. They do not involve the valuation of evidence or the application of rules of local law or special familiarity and experience with the materials and the underlying considerations on which judgment must be based. On the contrary, the constitutional history and the cases upon which the decision ultimately must turn are the special concern of this Court."

Lurk v. United States, 366 U.S. 712, 712-13 (1961) (Frankfurter, J., dissenting, joined by Harlan and Stewart, JJ.). *See also* Pet. for Cert., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (stating that an intermediate appellate decision is not needed because "[a]ll essential questions of jurisdiction and procedure were fully explored in the tribunal of first instance"). Unlike *United States v. Clinton*, 524 U.S. 912 (1998) (denying petition for writ of certiorari before judgment), neither the District of Columbia Circuit nor any other circuit has any particular body of expertise in evaluating military commissions. Br. for Respondent The White House in Opposition to Petition for Writ of Certiorari, *United States v. Clinton*, No. 97-1924, at 12 (The D.C. Circuit "has developed over the years a body of decisional

law that is specially focused on the issues arising out of the governmental attorney-client privilege . . . ."). Here, the issues will come down to the meaning of a series of Supreme Court decisions, from *Milligan* and *Quirin* to *Hamdi* and *Rasul*.

Mr. Hamdan, as well as the entire government of the United States, those affected by the government's actions, the lower courts, and the world community stand to benefit from clear guidance as to how the United States may wage the legal war on terror in the future. Similarly, our country has a pressing need to know that those implicated in that war are being treated in the way the Constitution, our statutes, and the laws of war demand.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

RESPECTFULLY
SUBMITTED,

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